United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,408

WILLIE SMITH,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From A Judgment of the United States
District Court for the District of Columbia

Philip S. Neal

Counsel for Appellant

(Appointed by this Court)

1700 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006

QUESTION PRESENTED

1. Whether there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that appellant took a billfold and its contents from the person or possession of the complaining witness, where (a) there was no testimony that the complaining witness had possession of his billfold prior to the alleged robbery, (b) no witness saw appellant take a billfold from the person or possession of the complaning witness, and (c) the billfold was never recovered.

TITLE PAGE

WILLIE SMITH,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

INDEX

TABLE OF CASES

JURISDICTIONAL STATEMENT

Willie Smith was indicted for the alleged February 26, 1966 robbery from Arthur Barr of a billfold containing approximately fifty-five dollars. He was arrested on February 26, 1966 and was indicted for robbery (22 D.C. Code §2901) on April 18, 1966. He pleaded not guilty on April 29, 1966, and on June 29-30, 1966, was tried in the United States District Court for the District of Columbia and was found by a jury to be guilty as charged. The trial court had jurisdiction under D.C. Code §11-521. On July 29, 1966, a judgment of conviction was entered, and the appellant was sentenced to imprisonment for a period of not less than 30 nor more than 90 months.

On July 29, 1966, the trial court granted appellant's motion for leave to prosecute an appeal without prepayment of costs. This Court has jurisdiction under 28 U.S.C. §1291 and §1294.

STATEMENT OF THE CASE

A. Events Leading Up To The Alleged Robbery

The complaining witness, Arthur Barr, testified that on the day before the alleged robbery, February 25, 1966, he had used money in his billfold to buy gas and a few other items. (Tr. 33). He never saw his money again after he made those purchases on the day prior to the alleged robbery. (Tr. 34).

Mr. Barr arose at approximately 5:00 A.M. on February 26, 1966, prior to daybreak; he dressed, ate his breakfast, and left for work in his automobile. (Tr. 31,32). He drove directly downtown to L Street, N. W., where he parked his automobile by the curb between 12th and 13th Streets. (Tr. 33). He walked from his automobile to the corner of 13th and L Streets, N. W. (Tr. 27, 28). The time was approximately 6:00 A.M.; it was just beginning to get light. (Tr. 6).

At the time when Mr. Barr parked his car on L Street and walked toward the corner, Detective Ronald P. Jenkins and Detective Sergeant Theodore R. Carr were parked in an unmarked cruiser in the 1200 Block of L Street, N. W. (Tr. 4). Detective Jenkins observed Mr. Barr as he parked

his car, got out, and proceeded to the corner. (Tr. 4, 5).

B. Testimony Relating To Alleged Robbery

As Mr. Barr reached the corner of 13th and L Streets, N. W., he encountered the appellant and Wilbert Crews; the testimony concerning what happened during that encounter is contradictory. (Tr. 5, 28, 39). Appellant and Willie Crews testified that appellant bumped into Mr. Barr accidentally, pushed him down, and fled without attempting or intending to take anything from him. (Tr. 39, 45, 48, 49, 54).

Detective Jenkins' testimony regarding the incident was different. He testified that, as the appellant and Wilbert Crews approached Mr. Barr, one of them grabbed him from behind and the other struck him several times in the face. (Tr. 5). Detective Jenkins testified he saw them throw Mr. Barr to the ground, saw the whites of his pockets being turned out, and saw them move away from Mr. Barr. (Tr. 5).

Detective Jenkins also testified that, while the incident was taking place, he overheard appellant or Wilbert Crews say: "Give me your billfold", or words to that effect. (Tr. 6). After Mr. Barr had been thrown to the ground, Detective Jenkins testified, he heard one of them say:

"I've got it, I've got it." (Tr. 6).

Mr. Barr testified that as he approached the corner, appellant or Wilbert Crews knocked him against the building and grabbed him around the neck. (Tr. 28). The other one struck him in the face several times, and Mr. Barr lost consciousness. (Tr. 28, 29). As he returned to consciousness, he heard one of them say: "I have got it." Mr. Barr did not miss any of his possessions immediately after appellant and Wilbert Crews disappeared. (Tr. 29).

C. Testimony Relating To Events Following The Alleged Robbery

After appellant and Wilbert Crews departed, Mr. Barr got to his feet and went to the vestibule of the Daily News Building around the corner. (Tr. 29). A while later, about the time that Detective Jenkins arrived at the Daily News Building, Mr. Barr reached in his pocket for his handkerchief and discovered that his billfold was missing. (Tr. 29, 30). He never saw the billfold, or the papers contained therein, again. (Tr. 30).

As appellant and Wilbert Crews left Mr. Barr, Detective Carr, who was driving the unmarked car, pulled alongside them and Detective Jenkins told them to stop. (Tr. 7). They began to run, and Detective Jenkins got out and chased Wilbert Crews on foot. (Tr. 7). Detective Carr chased appellant in his unmarked cruiser. (Tr. 17, 18).

Wilbert Crews and appellant never left the sight of Detectives Jenkins and Carr, respectively, and were apprehended. (Tr. 7, 8, 17, 18).

Appellant and Wilbert Crews were searched after they were arrested; they did not have Mr. Barr's billfold or money. (Tr. 9, 10, 19). The routes over which they were chased by Detectives Jenkins and Carr were also searched, but the billfold and money were never found. (Tr. 10-12, 19).

D. Appellant's Motions For Judgment Of Acquittal

Counsel made motions for acquittal on three separate occasions. At the end of the presentation of the prosecution's case, and at the end of the presentation of all of the evidence in the case, counsel for appellant moved the trial court to enter a judgment of acquittal. (Tr. 35, 56, 57). In addition, on July 6, 1966, subsequent to the rendition of the verdict of guilty on June 30, 1966, but prior to the entry of judgment on July 29, 1966, counsel for appellant moved the trial court to enter a judgment of acquittal, non obstante veredicto. (Original Record).

STATUTE INVOLVED

District of Columbia Code (1961 Ed. as amended), §22-2901. Robbery.

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, Ch. 854, §810).

STATEMENT OF POINTS

The District Court erred:

1. In failing to grant appellant's motion for a judgment of acquittal because there was a complete lack of relevant evidence from which the jury could properly find, or infer, beyond a reasonable doubt that appellant or his companion took the billfold and its contents from the person or immediate actual possession of Mr. Barr.

SUMMARY OF ARGUMENT

In the early morning of February 26, 1966, shortly before daybreak, a scuffle took place between appellant, his companion, and Mr. Barr, the complaining witness. The scuffle was observed by two detectives at a distance who heard and saw enough to convince them that a robbery, or an attempted robbery, was taking place. Shortly after the scuffle, Mr. Barr missed his billfold and the appellant and his companion were apprehended. However, a search revealed that neither the appellant nor his companion had Mr. Barr's billfold. Appellant and his companion were arrested, indicted and convicted of robbery.

During the trial appellant moved for a directed verdict of acquittal on three separate occasions. The law requires that a motion for direction of a verdict of acquittal must be granted when a crime is not made out even if the truth of all of the evidence given on the part of the government is assumed. France v. United States, 164 U.S. 676 (1897). This Court has held that "*** if there is no evidence upon which a reasonable man might fairly conclude guilt beyond a reasonable doubt, the motion (for directed verdict of acquittal) must be granted." Curley v. United

States, 81 U.S. App. D. C., 389, 160F2d 229(1947).

Appellant submits that no relevant evidence was introduced from which the jury could have reasonably inferred, beyond a reasonable doubt, that appellant robbed Mr. Barr of his billfold; accordingly, an essential element of the crime of robbery was not proven. None of the individual items of testimony even proved that Mr. Barr had his wallet at the time of the scuffle. Detective Jenkins saw the whites of Mr. Barr's pockets being turned out, but he did not see appellant take the billfold. He overheard appellant say: "Give me your billfold", but appellant's request for the billfold did not prove that Mr. Barr had one in his pocket. Detective Jenkins also heard him say: "I've got it", but the jury could only speculate that the "it" was Mr. Barr's billfold. Furthermore, although Mr. Barr did miss his billfold after the scuffle, it was never established that he had his billfold before the scuffle.

Even when the government's evidence is considered as a whole, it does not establish a robbery as distinguished from an attempted robbery. A robbery can be inferred from the proximity of the statements - "Give me your billfold" and "I've got it" only if it is established that Mr. Barr

did in fact have a billfold with him at the time of the scuffle. Evidence to establish that point was noticeably lacking. That being so, "it" could have referred to almost anything in addition to a billfold.

ARGUMENT

NO WITNESS SAW APPELLANT TAKE THE BILLFOLD FROM THE ALLEGED VICTIM, AND NO EVIDENCE WAS INTRODUCED TO SHOW THAT THE ALLEGED VICTIM HAD HIS BILLFOLD PRIOR TO THE INCIDENT OR THAT THE APPELLANT HAD THE BILL-FOLD AFTER THE INCIDENT; ACCORDINGLY, THERE WAS A COMPLETE LACK OF EVIDENCE FROM WHICH THE JURY COULD PROPERLY FIND OR INFER BEYOND A REASONABLE DOUBT THAT THE APPELLANT TOOK THE BILLFOLD.

(Transcript pages 5, 6, 17, 28-30, 33, 34).

When proper and legal evidence has been given in a criminal trial, which if believed is sufficient to make out a crime and to sustain a conviction, a request for a directed

verdict for acquittal must be denied. However, when a crime is not made out even if the truth of all of the evidence given on the part of the government is assumed, a motion for direction of a verdict of acquittal must be granted. France v. United States, 164 U.S. 676 (1897).

The question of when a directed verdict of acquittal must be granted was exhaustively examined by this Court in Curley v. United States, 81 U.S. App. D.C., 389, 160F2d 229 (1947). This Court observed that the truth of the government's evidence must be assumed, and that all legitimate inferences to be drawn therefrom must be conceded, by the trial court ruling upon the request for a directed verdict. This Court then proceeded to set forth the rule to be followed in determining whether a verdict of acquittal must be granted:

> "The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is

> "such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration." p.232.

In the same opinion this Court further elaborated upon the rule in the following language:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted." pp.232, 233.

In another case the United States Supreme Court applied the rule for a directed verdict of acquittal in the following manner:

> "Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners transported the girls in interstate commerce 'for the purpose of prostitution or debauchery' within the meaning of the Mann Act." Mortensen v. United States, 322 U.S. 369 (1944).

Taking something of value from the person or possession of another is an essential element of the crime of robbery as spelled out in D. C. Code (1961 Ed.) Sec. 22-2901, and a close analysis of the testimony in this case reveals that there was no evidence from which the jury could find or infer that the appellant or his companion took Mr. Barr's billfold. Accordingly, the District Court erred in not directing the jury to return a verdict of acquittal.

Certainly the testimony of Detectives Jenkins and Carr did not justify the jury's inferring, beyond a reasonable doubt, that appellant took Mr. Barr's billfold. The only relevant testimony of Detective Carr was as follows:

> "Q. All right, where did you observe Mr. Barr?
>
> A. My attention was first directed toward him ... I was sitting in the cruiser. I heard someone holler. I was parked about a third of the length of the block from 13th Street. I heard someone holler and I saw a scuffle, saw one man down on his knees. Later I learned it was Mr. Barr. And I observed two gentlemen running from the scene, two negro males running from the scene east on L Street, Northwest." (Tr. p. 17).

Detective Carr heard someone holler, saw a scuffle, and observed two men run away. That testimony, taken alone,

does not justify the inference that a billfold, or any other object, was taken from Mr. Barr during the incident.

The more detailed testimony of Detective Jenkins is equally lacking in facts from which the taking could be inferred beyond a reasonable doubt. He testified:

> "When he, (Mr. Barr) approached the southeast corner of 13th and L Streets, Northwest, a negro male grabbed him from behind; another negro male approached him from the front and struck him several times in the face.
>
> "Mr. Barr was thrown to the ground. I could see the whites of his pockets being turned out. Both subjects moved away from the subject. They ran about three or four steps east in the 1200 Block of L Street and then began to walk at a fast pace east in the 1200 Block of L Street."
>
> "Q. Now, while this was going on, Officer Jenkins, did you hear anything, overhear anything?
>
> A. Yes, sir, I did.
>
> Q. And what did you overhear?
>
> A. I overheard one of the subjects say, 'Give me your billfold', words to that effect; and a short time later, after the complainant had been thrown to the ground, I overheard one of the subjects say: 'I've got it, I've got it.'" (Tr. pp. 5, 6).

Only three statements in that testimony are relevant to the alleged taking. In the first of those statements,

Detective Jenkins testified that he saw the whites of Mr. Barr's pockets being turned out. The jury certainly could infer from that testimony that appellant searched Mr. Barr's pockets in an effort to find something of value. But the jury could not infer from that evidence that appellant took Mr. Barr's billfold, for Detective Jenkins did not testify that he saw appellant take the billfold. Moreover, the jury could not even conclude from that testimony that Mr. Barr was carrying a billfold; the search by appellant could have revealed that he did not have his billfold with him.

Detective Jenkins also heard appellant say: "Give me your billfold." The most that could be inferred from such a statement is that appellant <u>thought</u> that Mr. Barr would have a billfold and asked him for it; a jury could not infer from that statement, beyond a reasonable doubt, that Mr. Barr actually had a billfold at that time. Indeed, if Mr. Barr did have his billfold in its customary place, his back pocket, appellant could not have seen it. (Tr. 30).

Detective Jenkins also testified that shortly after the first statement he heard appellant say: "I've got it." A jury could speculate that the pronoun "it" related to the "billfold" mentioned in the preceding statement and thus

conclude that appellant took Mr. Barr's billfold. But, as this Court stated in Curley, supra, the jury must not be permitted "to conjecture merely, or to conclude upon pure speculation ***." The appellant could have been referring to Mr. Barr's billfold; he also could have been referring to some one of his own possessions which he might have dropped during the scuffle. Under those circumstances the jury could not have inferred, beyond a reasonable doubt, that appellant was in fact referring to Mr. Barr's billfold.

Nor could the jury have inferred from Mr. Barr's testimony that appellant took his billfold. The relevant portion of his testimony follows:

> "*** And, finally, I think he hit me on the forehead and I became unconscious--I don't know how long, possibly a quarter of a minute--and as I returned to consciousness I heard one of these men say: 'I have got it.'"
>
> "Q. I have got it?"
>
> "A. I have got it. And then they disappeared."
>
> "Q. After you became fully conscious and were aware of your surroundings, did you miss anything?"
>
> "A. I didn't at the moment because I was concerned about myself.***"
>
> • • •
>
> "Q. Did there come a time when you discovered something missing from your person?"
>
> "A. Yes, I did. About that time or previous

> to the time the officer came back I reached into my pocket for my handkerchief, which I usually carry over my wallet. The handkerchief was gone and the wallet was gone. And I reached into my other back pocket, the right side, and I had a spare handkerchief and I put it to my nose. It was bleeding." (Tr. 28-30).

The salient fact emerging from Mr. Barr's testimony is that he did not see or feel appellant take his wallet. His testimony corroborated Detective Jenkins' recollection that appellant yelled: "I've got it" during the scuffle, but it already has been pointed out that such testimony does not support the conclusion that appellant took his billfold. Mr. Barr did miss his billfold after the scuffle, but he could not say <u>when</u> he had lost his billfold. The jury could not infer from his testimony, beyond a reasonable doubt, that Mr. Barr had lost his billfold during the scuffle rather than some time preceding the scuffle. If anything, the fact that his handkerchief was also missing from its regular place is evidence of the fact that he did not have his billfold and handkerchief with him at the time of the scuffle. Why would appellant have kept his handkerchief even if he had grabbed it accidentally?

Testimony elicited from Mr. Barr on cross-examination by appellant's counsel also fails to support the inference that Mr. Barr did have his billfold at the time of the scuffle

with appellant. The relevant testimony appears at pages 33-34 of the transcript:

> "Q. Now, how do you know that you had $55.00 in your billfold?"
>
> "A. I am not positive that there was $55.00. I thought possibly there might have been a few dollars more. But I had spent a few dollars for gas and one or two other items that I have forgotten. I think the closest figure would be $55.00."
>
> "Q. When was it that you bought the gas and the few other items, Mr. Barr?"
>
> "A. The day before."
>
> ...
>
> "Q. So, in any event, the last time that you saw any money was the day before when you made the purchases?"
>
> "A. Yes, it was the day before when I purchased gas."

Not only is each fragment of the government's evidence, when considered in isolation, inconsistent with the theory that a robbery occurred, the testimony taken as a whole does not prove guilt beyond a reasonable doubt. The testimony of Detective Jenkins that he overheard the two statements: "Give me your billfold" and "I've got it" is the most damaging; but even that evidence will support the inference that appellant took the billfold <u>only</u> if it is established by independent evidence that Mr. Barr did in fact have a billfold in his possession at the time of the scuffle. Without that proof, a jury could not

conclude beyond a reasonable doubt that appellant was speaking of the billfold when he uttered the second statement. There was no such proof.

In some respects this case is similar to the circumstances in Hunt v. United States, 115 U.S. App. D.C.1, 316 F2d 652 (1963), in which appellant was convicted under a one-count indictment charging robbery. The victim in that case was jostled while standing in a crowd at a bus stop and, upon entering her bus, discovered her purse was open and her wallet missing. She departed the bus, hailed a policeman, and overtook the appellant who threw her wallet in the gutter a few feet from the place where he was arrested. This Court reversed the conviction for robbery on the ground that there was insufficient evidence to prove that the wallet had been taken from the victim's person as opposed to having been found on the sidewalk. It held, however, that the trial court would have been justified in charging the jury on the lesser included offense of larceny since there was sufficient evidence to conclude that the appellant appropriated the wallet to his own use even if he found it on the sidewalk.

In comparison with the Hunt case, there is evidence in this case to indicate that the appellant assaulted the victim, but there is no evidence to show that he took the victim's billfold. As in the Hunt case, there is evidence

to prove another offense, but not all of the elements of the crime of robbery have been proved. In this case the testimony tended to show the offense of attempted robbery, whereas in the Hunt case the other offense was larceny.

To summarize, although the jury could have properly found that an attempted robbery occurred, there was no evidence upon which a reasonable person might fairly have concluded, beyond a reasonable doubt, that appellant actually took Mr. Barr's billfold. Without a taking, there could have been no robbery. Thus, the trial judge erred in not granting appellant's repeated motions for a directed verdict.

CONCLUSION

For the reasons stated, the judgment of conviction of appellant Willie Smith in Criminal Action No. 460-66 in the United States District Court for the District of Columbia should be reversed and remanded with instructions to enter a judgment of acquittal.

Respectfully submitted,

Philip S. Neal
Attorney for Appellant
(Appointed by this Court)
1700 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for appellant on appellee by hand-delivering a copy thereof this 23rd day of January, 1967, to David G. Bress, Esquire, United States Attorney in and for the District of Columbia, United States Court House, Washington, D. C.

Philip S. Neal

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 20,408

WILLIE SMITH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From A Judgment of the United States District Court for the District of Columbia

---

Philip S. Neal
Counsel for Appellant

(Appointed by this Court)

1700 Pennsylvania Avenue
Washington, D. C. 20006

APPELLEE FAILED TO PROVE APPELLANT GUILTY BEYOND A REASONABLE DOUBT BY FAILING TO PROVE THAT APPELLANT TOOK SOMETHING OF VALUE FROM COMPLAINANT

Appellee erroneously asserts that appellant's trial counsel was satisfied that complainant had possession of his billfold at the time of the assault.[1] Appellee bases this erroneous conclusion on the fact that appellant's trial counsel did not ask complainant directly whether he had his billfold at the time of the assault. In point of fact, immediately subsequent to his cross examination of complainant the appellant's trial counsel moved the court to enter a directed verdict " * * * pointing specifically to the skimpy evidence with respect to anything taken." Tr. 35. Trial counsel subsequently followed up that line of argument by filing a motion for a judgment non obstante veredicto on the ground that the appellee failed "* * * to adduce evidence to show that the complaining witness actually had on his person the wallet or billfold which constituted the property alleged to

1. "* * * The victim's words that 'the wallet was gone' carry the clear implication that the wallet had been in his pocket prior to the assault--just as clear as if he had been asked the direct question. The fact that appellant's trial counsel did not press the questioning on this point indicates that he too was satisfied that the victim had his wallet before the assault." Appellee's Brief, p.

have been taken by defendants." (Original record). Thus, the record amply documents the fact that appellant's trial counsel never conceded that the appellee proved complainant had the billfold at the time of the assault.

It is possible that the language quoted in footnote 1 does not exactly express the meaning intended by the appellee; appellee may have sought to imply that appellant failed to sustain his burden of proving that complainant did not have his wallet at the time of the assault. This interpretation of the language is unacceptable, however, for the appellee must be fully aware of its own burden of proving appellant guilty beyond a reasonable doubt. No inference unfavorable to appellant can be drawn from appellant's failure to undertake the burden of proving appellee's case, for he has no such burden.

Appellee's argument merely emphasizes its own failure to prove that a robbery was committed. Appellee never introduced direct evidence of the allegation that appellant took the billfold: complainant described the assault but failed to state that he saw or felt appellant take his billfold (Tr., pp. 26-31); a police officer who was an eyewitness to the incident failed to testify that he saw appellant take the complainant's billfold; (Tr. 5-6); a police officer who had appellant in his sight from the

time of the incident to his arrest searched him and the route he followed and did not find the billfold; (Tr. 6-13, 16-20); and upon cross examination the complainant testified that the last time he saw any money in his billfold was the day before the incident occurred (Tr. 34). Despite this absence of direct evidence to prove a taking, the appellee failed to recall the complainant for redirect examination to establish the fact that he did have his billfold at the time of the incident. (Tr. 34).

Appellee's failure to introduce direct testimony that complainant had his billfold at the time of the incident, especially after that became an issue, was very peculiar. Certainly appellee's trial counsel would have preferred to eliminate the doubt whether complainant had his billfold when assaulted; it is reasonable to infer, therefore, that he would have asked the direct question if he had been certain of receiving an affirmative answer. It is reasonable to assume, moreover, that appellee's trial counsel interviewed complainant prior to trial to determine whether he could testify that he had his wallet at the time of the assault. After all, the failure to locate the missing wallet was a real mystery. Therefore, the only reasonable inference which may be drawn from the failure of appellee's trial counsel to pursue this issue on redirect examination is that he knew

complainant could not state with certainty that he had his billfold at the time of the robbery. It is exactly this failure of proof which compels the conclusion that appellee did not prove beyond a reasonable doubt that a robbery was committed.

In substance the appellee relies on one highly speculative inference to sustain conviction--that it may be inferred beyond a reasonable doubt that complainant had his billfold when assaulted because he customarily carried a billfold. Such an inference does not take into account the possibility that complainant may have lost his billfold the day before, or even on the day of the assault, without ever realizing it. Appellee did not even introduce evidence to show the regularity with which complainant carried his billfold. The jury could not infer from such evidence, beyond a reasonable doubt, that complainant did in fact have his billfold with him at the time of the assault. Appellee should not be permitted to prevail on the weight of such a speculation when it was totally within appellee's capacity to prove that complainant did have his billfold at the time of the assault.

For the reasons stated, appellant renews his

request that his judgment of conviction be reversed.

Respectfully submitted,

Philip S. Neal
Attorney for Appellant

(Appointed by this Court)

1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Reply Brief for appellant on appellee by hand-delivering a copy thereof this 24th day of February, 1967, to David G. Bress, Esquire, United States Attorney in and for the District of Columbia, United States Court House, Washington, D. C.

Philip S. Neal

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,408

WILLIE SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

HENRY K. OSTERMAN,
Special Attorney
to the United States Attorney.

Cr. No. 460-66

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Were appellant's motions for judgment of acquittal on this robbery charge properly denied where the Government's evidence showed that the attack on the victim had been witnessed by two police officers, one of whom had seen the victim's pockets being turned out, and the victim testified that after the attack his wallet "was gone" from his pocket?

INDEX

TABLE OF CASES

OTHER REFERENCES

---

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,408

WILLIE SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 18, 1966 appellant and one Wilbert Crews were charged with robbery of Arthur Barr on February 26, 1966 (22 D.C. CODE § 2901). Appellant and his co-defendant were tried by a jury on June 29-30, 1966. At the conclusion of the Government's case and again at the end of the entire case appellant moved for a directed verdict of acquittal. Both motions were denied. (Tr. 35, 57.) The jury found appellant and his co-defendant guilty and appellant was subsequently sentenced to imprisonment for a period of 30 to 90 months.

The victim of the robbery, Arthur Barr, a stereotyper employed by the Washington Daily News, left his home in his car at approximately 5 a.m. on February 26, 1966 and drove to his place of work which is located on 13th Street a few doors north of L Street, Northwest (Tr. 26, 27). At approximately 6 a.m. he parked his car in front of a nearby school building. As he approached the corner of 13th and L Streets the appellant and his co-defendant Crews came toward him from the opposite direction. When the pair reached him appellant bumped the victim, knocking him against the building on the corner; appellant then threw his arm around the victim's neck elevating his chin. Appellant's co-defendant, Crews, punched Barr in the face several times, knocked off his glasses and cut his nose. Barr lost consciousness. (Tr. 28.) When he recovered consciousness, and while lying on the ground, he heard one of his attackers say "I have got it," then both disappeared (Tr. 29). The victim got to his feet and walked into the vestibule of the Daily News Building. At this point the victim reached into his pocket for a handkerchief and found that his handkerchief and wallet, which he usually kept covered by his handkerchief, were missing. Mr. Barr stated that he had approximately $55.00 in his wallet at the time of the attack (Tr. 29-30).

The attack was not unwitnessed. At the time of the attack Detective Ronald P. Jenkins and Detective Sgt. Theodore R. Carr were parked in an unmarked police cruiser in the 1200 block of L Street, Northwest, about 50 feet from the spot where the assault took place (Tr. 13-14). Detective Jenkins observed Mr. Barr park his car in the 1200 block on L Street, get out and lock the car and then walk west on L Street (Tr. 4-5). At the corner of 13th and L Streets he observed appellant grab the victim from behind while the appellant's accomplice approached the victim from the front and struck the victim in the face (Tr. 4-5). He observed the victim being thrown to the ground and could see the whites of his

pockets being turned out (Tr. 5). The detective also overheard one of the attackers say "Give me your money" or "Give me your billfold" and then a short time later "I've got it, I've got it" (Tr. 6). At the time of the attack it was just beginning to get light. The street lamp on that particular corner was still on (Tr. 5, 6). There were no other people on the street at the time (Tr. 6-7).

After the incident Detective Sgt. Carr who was driving the police car pulled up alongside the appellant and his co-defendant who were walking east on L Street at a fast pace. Jenkins called out "Stop, police officers." Both defendants began to run. Jenkins pursued Crews on foot and arrested him in the 1100 block on L Street (Tr. 7).

Detective Sgt. Carr first observed the assault when he heard someone cry out. He saw a scuffle and observed the victim on his knees on the sidewalk and two men running away (Tr. 17). After letting Detective Jenkins out of the cruiser Carr pursued the appellant in the cruiser. The chase covered several blocks before the officer was able to get out of the cruiser and make the arrest (Tr. 17).

Both defendants were taken to the Washington Daily News Building where they were immediately identified by the victim (Tr. 10). Thereafter the defendants were searched at the scene and in the stationhouse, but neither the wallet nor the money was recovered (Tr. 9-10). Subsequently, in order to find the victim's wallet and money police officers retraced the route over which appellant had fled (Tr. 10-11).[1]

At the trial the police officers identified the appellant and his co-defendant as the men whom they had apprehended after the assault on Mr. Barr (Tr. 8, 17-18).

---

[1] In the course of the chase by Sgt. Carr appellant had run through a park where there were hedges and shrubs and through an alley in the 1100 block of K Street where there were abandoned cars and garbage cans. His route also went by a construction site and there were sewer openings along the streets where he ran (Tr. 11-12, 19, 51).

In his defense the appellant testified that he and the co-defendant had left a party late on the evening of February 25th and had gone to the Greyhound Bus Terminal arriving there at about 3 a.m. on February 26 intending to take a bus to Alexandria, Virginia; that the next bus was scheduled to leave at 7:30 a.m.; and that he and the co-defendant had been walking up 13th Street on the way to a Peoples Drug Store when he bumped into Mr. Barr (Tr. 52-53). He pushed Mr. Barr who fell against a brick wall and then to the street and "started hollering." Appellant stated he became frightened and ran, calling on the co-defendant to do the same (Tr. 48-49). He kept on running down L Street and through the park at 11th and L and down 11th Street until stopped and arrested by Detective Sgt. Carr (Tr. 51). Appellant denied that he or the co-defendant had choked or struck Mr. Barr or taken his wallet or money. Appellant's credibility was impeached by a prior recent conviction for assault with a dangerous weapon (Tr. 55).

Wilbert Crews, the co-defendant also testified that he and appellant had attended a party the evening of February 25 but stated that they had arrived at the Greyhound Bus Terminal at about 12:30 or 1 a.m. on February 26 (Tr. 44). He further testified that appellant had bumped into Mr. Barr as they were walking up 13th Street; that appellant had pushed Mr. Barr who fell down and commenced "hollering." At appellant's urging he ran away until stopped by Detective Jenkins and arrested (Tr. 39, 45).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted there-

of shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

In a prosecution for robbery, where two police officers witnessed the assault on the victim and one officer overheard a defendant demand the victim's billfold, saw the victim's pockets being turned out and heard one of the defendants say "I've got it" and the victim testified that his wallet was gone immediately after the assault, the trial judge properly denied the defendant's motion for a directed verdict of acquittal.

ARGUMENT

In a prosecution for robbery where two police officers witnessed an attack on the victim and one officer overheard a demand for victim's billfold, saw the victim's pockets being turned out and heard one of the attackers say "I've got it" and the victim testified that his wallet was gone immediately after the attack, the trial judge properly denied defendant's motion for a directed verdict of acquittal.

(Tr. 5, 11-12, 17, 19, 29-30, 51)

Appellant argues that the Government presented no relevant evidence from which the jury could have reasonably inferred, beyond a reasonable doubt, that appellant robbed the victim of his wallet because the record does not establish that the victim had a wallet before he was assaulted.[2] As a consequence appellant urges that the

---

[2] Appellant argues that the words "I've got it, I've got it" spoken by one of the defendants after the victim's wallet had been demanded could have referred to something other than the victim's wallet—even one of appellant's possessions dropped during the scuffle (App. Br. 15). This we submit is a highly speculative interpretation of the incident. There was no evidence offered at the trial by the appellant which even suggests that the words in question referred to anything other than the victim's wallet. Of course, the significance of these words was for the jury to decide.

trial court was in error when it denied appellant's motions for a directed verdict of acquittal.

While appellant is correct in saying that no one saw him take the wallet from the victim's pocket, it is a fact also that one of the police officers observed the victim's pockets being turned out following the demand for the victim's billfold (Tr. 5). Coupled with the victim's discovery a few minutes after the scuffle that "the wallet was gone" (Tr. 29-30) these facts constitute sufficient evidence from which the jury could draw the "justifiable inference of fact" that appellant had taken the victim's wallet. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947). The victim's words that "the wallet was gone" carry the clear implication that the wallet had been in his pocket prior to the assault—just as clear as if he had been asked the direct question. The fact that appellant's trial counsel did not press the questioning on this point indicates that he too was satisfied that the victim had his wallet before the assault.[3]

Appellant cites *Curley* v. *United States*, *supra*, to support his argument that the trial judge should have granted appellant's motions for a directed verdict of acquittal. *Curley*, however, is of no help to appellant. In that case this Court expressly stated:

> "The functions of the jury include the determination of the credibility of the witnesses, the weighing of the evidence, *and the drawing of justifiable inferences of fact from proven facts.*" (Emphasis added.)

81 U.S. App. D.C. at 392, 160 F.2d at 232.

---

[3] The failure of the police to locate the wallet after the assault cannot support appellant's argument that the wallet was not taken from the victim. The record shows that in his efforts to avoid arrest appellant ran through a park filled with shrubbery, through an alley in which there were garbage cans and abandoned cars, past a construction site, and along several streets where there were sewer openings (Tr. 11-12, 17, 19, 51). In the early morning darkness it would have been a simple matter to get rid of the incriminating wallet anywhere along the route of the chase without being observed.

Where the trial judge finds the evidence to be such that reasonable jurymen must *necessarily* have a reasonable doubt, a motion for acquittal should be granted. However, as in the instant case, where the evidence is such that reasonable jurymen, after drawing justifiable inferences of fact, could or could not have a reasonable doubt, the issue should be left for the jury to decide. *Curley* v. *United States*, *supra*, at 392, 160 F.2d at 232.

Tested by the foregoing rules the evidence given by the victim and the two police officers fully justified the trial court's denial of appellant's motions for acquittal.

Hunt v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963), also relied upon by appellant offers him no support. In that case a conviction for robbery was reversed because there was no evidence in the record to connect the defendant with a "taking by force or stealth" from the person or immediate actual possession of the complaining witness—an essential element of the offense of robbery. By way of contrast the record in the instant case contains ample evidence that the victim's property was taken from him by force. Cf. *Jackson* v. *United States*, 123 U.S. App. D.C. 276, 359 F.2d 260 (1966). The verdict of the jury in this case must be affirmed if, taking the view most favorable to the Government, there is substantial evidence in the record to support the jury's verdict. *Glasser* v. *United States*, 315 U.S. 60 (1941); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

HENRY K. OSTERMAN,
Special Attorney
to the United States Attorney.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 247289 649